PRIVATE SECURITIES LITIGATION/Safe Harbor Insider Trading

SUBJECT: **Private Securities Litigation Reform Act of 1995 . . . S. 240. D'Amato motion to table the Boxer amendment No. 1480.**

ACTION: MOTION TO TABLE AGREED TO, 56-42

SYNOPSIS: As reported with an amendment in the nature of a substitute, S. 240, the Private Securities Litigation Reform Act, will enact changes to current private securities litigation practices in order to discourage unjust suits and to provide better information and protection from fraud for investors.

The Boxer amendment would exclude from safe harbor protection false or misleading forward-looking statements if, in connection with such statements, a company financially benefitted from the purchase or sale of securities worth more than $1 million, or if an officer of the company financially benefitted from the purchase or sale of securities worth more than $50,000.

Debate was limited by unanimous consent. Following debate, Senator D'Amato moved to table the Boxer amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

Those favoring the motion to table contended:

The type of insider training which the Boxer amendment's proponents say they are trying to reach is already prohibited by law, and that prohibition will not be affected by this bill. Directors of public companies are forbidden from buying or selling any securities 30 days prior to a public announcement, and they may not enter the market within 48 hours of an announcement. Those Senators who have legal backgrounds, with no practical business experience, simply do not understand the way the current law works. Suits are so commonly filed against directors of companies that it is hard to find competent directors willing to serve. Senator Bennett, for example, when he was helping a company go public, could not find people willing to serve as directors until the company volunteered to purchase $20 million in insurance for each of them. Perhaps the most common allegation of fraud that is made against directors is for exercising stock options. Volatile start-up companies and companies in financial distress often hire talented people by paying

(See other side)

YEAS (56)

Republicans (49 or 92%)		Democrats (7 or 16%)
Abraham	Helms	Baucus
Ashcroft	Hutchison	Bingaman
Bennett	Inhofe	Dodd
Brown	Jeffords	Harkin
Burns	Kassebaum	Johnston
Campbell	Kempthorne	Lieberman
Chafee	Kyl	Pell
Coats	Lott	
Cochran	Lugar	
Coverdell	Mack	
Craig	McConnell	
D'Amato	Murkowski	
DeWine	Nickles	
Dole	Packwood	
Domenici	Pressler	
Faircloth	Roth	
Frist	Santorum	
Gorton	Shelby	
Gramm	Simpson	
Grams	Smith	
Grassley	Stevens	
Gregg	Thomas	
Hatch	Thompson	
Hatfield	Thurmond	
	Warner	

NAYS (42)

Republicans (4 or 8%)	Democrats (38 or 84%)	
Cohen	Akaka	Inouye
McCain	Biden	Kennedy
Snowe	Boxer	Kerrey
Specter	Bradley	Kerry
	Breaux	Kohl
	Bryan	Lautenberg
	Bumpers	Leahy
	Byrd	Levin
	Conrad	Mikulski
	Daschle	Moseley-Braun
	Dorgan	Moynihan
	Exon	Murray
	Feingold	Nunn
	Feinstein	Pryor
	Ford	Robb
	Glenn	Rockefeller
	Graham	Sarbanes
	Heflin	Simon
	Hollings	Wellstone

NOT VOTING (1)

Republicans (0)	Democrats (1)
	Reid-[2]

VOTING PRESENT(1)

Bond

EXPLANATION OF ABSENCE:

1—Official Buisiness
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:

AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

them with generous stock options. In effect, those people who accept such payment plans bet on their ability to make a company grow. When they exercise those options, they are then targets for suits. Another common method of paying executives is to pay them at least partially based on the company's performance. Senator Bennett was paid as a board member of a company on that basis, and found that the practice made the company subject to a regular, yearly suit from a New York lawyer. Each year, that lawyer filed an enormous multi-million lawsuit alleging fraud because of the performance pay, and each year the company paid him $100,000 to drop the suit because it was easier than fighting it. The $100,000 payoff was even written into the company's budget. In short, the laws on insider training are already tight, and subject to abuse; the Boxer amendment is therefore not needed.

The amendment, in addition to being unneeded, would also be very destructive of the safe harbor provision that will be created by this substitute amendment. Basically, the amendment says that if any officer or director of a company benefits from a stock sale, then any forward-looking statement that would otherwise be protected by this safe harbor would no longer be protected. The assumption being made by this amendment is that there is an automatic and nefarious connection between a forward-looking statement failing to come true and an officer or director benefitting from a stock trade. This assumption is nonsense. As we have already stated, officers and directors are constantly buying and selling shares of their companies, and are often paid with stock. Under the Boxer amendment, this normal activity would be instantly suspect anytime any forward-looking statement did not come true, and there would be no protection from suits. Even if a director had no knowledge of a particular forward-looking statement the safe-harbor protection would be lost. The Boxer amendment would give companies a new dilemma--either stop their directors from trading their stock, because that trading makes the safe harbor worthless for them, or quit making forward-looking statements in order to avoid suits. Neither option is acceptable. Paying executives based on the performance of a company serves as a strong incentive for them to find ways to make the company perform better, and providing extensive forward-looking statements improves investor confidence and helps a company grow. The Boxer amendment would make companies choose between these two benefits. We therefore urge our colleagues to table it.

Those opposing the motion to table contended:

The Boxer amendment would stop crooks from benefitting from insider trading that is based on fraudulent forward-looking statements. Under the terms of the substitute amendment to this bill, it will be possible for felons to escape prosecution for telling lies that push up the value of a company's stock at the same time as they are ditching their shares. For example, it would protect the fraud perpetrated by the directors of T2 Medical, Inc. They issued a forward-looking statement saying that "We expect continued steady revenue and earnings growth" even though they knew they were being investigated by a grand jury. They then sold-off $31 million worth of stock. When the news leaked out about the investigation, the value of the stock plummeted. Under current law, those directors could be prosecuted for making a fraudulent forward-looking statement. Under this bill, they could not be prosecuted even if it were shown that they knew the statement was not true; the only way they could be prosecuted would be if a plaintiff could prove that they had lied to mislead investors.

Unfortunately, after a lull from the excesses of the 1980s, which brought us the likes of Ivan Boesky and Charles Keating, insider trading is back with a vengeance. For instance, according to Business Week, the current merger frenzy has sparked an enormous amount of insider trading--one-third of the recent mergers have been preceded by stock price runups. Those insiders who traded on the merger information by and large have escaped punishment. If we pass the safe harbor provision that our colleagues have proposed, this already high level of insider trading will absolutely explode. The safe harbor provision is a license to steal for corporate officers. The Boxer amendment would revoke that license. We urge our colleagues to give it their support.